



April 6, 2001

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla
Dallas, Texas 75201

OR2001-1385

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145746.

The City of Dallas (the "city") received a request for information pertaining to more than 100 current and former city employees including any "employee hired or reclassified by [the Department of Water Utilities] for any engineering position 54, 56, 57 or 58 after January 20, 1989." In addition, the requestor seeks:

- (1) All grievances or any complaints filed against Jim Milstead (such as that filed by Jennifer Cottingham, etc.) and Daniel Saldana (such as that filed by S. Russell, etc.);
- (2) All of Mr. Milstead's involvement in performance evaluations for non-direct reports for the years 1995, 1996, and 1997;
- (3) Latest reclassification to pay level 56 for Michael York, Dorian Franck, and any other employees;
- (4) Records for temporary employees: Jim Biggerstaff, Robert Thrash, Paul Roach, James Martin, D. Cave, R. McDonald, etc.;
- (5) Position specifications for Engineer 54, 56, 57, and 58; and
- (6) E.I.T. status for all engineers 54.

You state you are gathering the requested information for Mr. Benes. However, you explain that there are no documents that respond to item numbers one, two and six above or that there are any position specifications for Engineer 58. The Public Information Act (the "Act") does not require a government entity to prepare or assemble new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 268 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You assert the responsive information in Exhibits B, D, E, and F is excepted from disclosure under sections 552.101, 552.103, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of documents in Exhibit B and the remainder of the submitted documents.¹

First, the requestor asks whether the city may charge labor costs for redacting information before releasing it. Section 111.63(d)(4) of Title 1 of the Texas Administrative Code states, "[w]hen confidential information is mixed with public information in the same page, personnel time may be recovered for time spent to obliterate, blackout, or otherwise obscure confidential information in order to release the public information." If the requestor has any further questions about costs, he should contact Hadassah Schloss at the General Services Commission at (512) 475-2497.

Section 552.301(d) of the Government Code provides:

A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

- (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and
- (2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.301(d)(1), (2). You state that the city received the request for information on January 18, 2001. However, from documents provided by the requestor, it appears the city failed to timely provide to the requestor a written statement that the city wishes to withhold the requested information or that the city has asked for a decision from the attorney general about whether the information is within an exception to public disclosure. Gov't Code § 552.301(d). The city's section 552.301(d) letter to the requestor was postmarked February 2, 2001. Consequently, you failed to respond to the requestor within the ten business day period mandated by section 552.301(d) of the Government Code. *See* Gov't Code § 552.308. If a governmental body does not timely provide the requestor with the information required by section 552.301(d), "the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. Because the city did not timely provide the requestor with the information required by section 552.301(d), the requested information is presumed to be public information. *Id.*

In order to overcome the presumption that the requested information is public information, the city must provide compelling reasons why the information should not be disclosed. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Section 552.103 of the Government Code does not constitute a compelling reason to overcome the presumption of openness. Open Records Decision No. 473 (1987). Therefore, the requested information cannot be withheld under section 552.103 of the Government Code. We note, however, that some of the information at issue must be withheld from public disclosure pursuant to sections 552.101, 552.117 and 552.130 of the Government Code.

You first assert that the blue highlighted portions of Exhibit B are exempt from disclosure under section 552.101 in conjunction with the common law right to privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Common law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has concluded that financial information concerning an individual is in some instances protected by a common law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that "all financial information relating to an individual . . . ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities." Open Records Decision No. 373 at 3 (1983).

You explain the blue highlighted portions of Exhibit B consist of the city's five digit personnel identification number and that these numbers are used as the first five digits of a

six digit account number at the City Employees Credit Union. You further assert that the release of these personnel identification numbers could give members of the general public access to credit union account records, and therefore, should be excepted under section 552.101 of the Government Code in conjunction with common law privacy. As we believe that no legitimate public interest exists in city employees' credit union account numbers, we conclude that the city must withhold the personnel identification numbers of those employees who are in fact members of the credit union. All remaining identification numbers must be released. We have marked the information that you must withhold under section 552.101 only if the employee is a member of the city's credit union.

Second, you assert the yellow highlighted portions of Exhibit B are exempt from disclosure under section 552.117 of the Government Code because they relate to the "home address, home telephone number, and social security number of a current or former government employee or official, as well as information that reveals whether the employee or official has family members." Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information of a current or former employee or official who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made.² Whether a particular piece of information is public must be determined at the time the request for it is made. *Open Records Decision No. 530 at 5 (1989)*. Therefore, if the employee has elected to not allow public access to this information in accordance with the procedures of section 552.024 of the Government Code and prior to the city's receipt of the present request, we believe that the city must withhold this information from required public disclosure pursuant to section 552.117. We have marked the kinds of information that must be withheld under section 552.117 if the employee timely made the election not to allow public access to the information.

Further, social security numbers may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained

² Within the submitted sample personnel files, both Terrace Stewart and Robert Thrash have made their section 552.024 elections prior to the city's receipt of the present request, thus preventing public access to their home telephone numbers, home addresses, social security numbers, and whether they have family members. Because the personnel files only represent a sample of the personnel files originally requested, the city must still determine, with regard to the remaining employees whose information is at issue, whether a particular piece of information is public at the time the request for it is made.

and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Third, you assert the red highlighted portions of Exhibit B are exempt from disclosure under section 552.130 of the Government Code because they contain information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Section 552.130 provides in relevant part that "[i]nformation is excepted from the requirements of Section 552.021 if the information relates to: (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or] (2) a motor vehicle title or registration issued by an agency of this state[.]" Therefore, you must withhold driver's license and motor vehicle title or registration information pursuant to section 552.130 of the Government Code.

Fourth, you assert Exhibits E and F are exempted in their entirety from disclosure under section 552.101 in conjunction with common law privacy because they contain financial information. As stated earlier, prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about it is excepted from disclosure by a common law right of privacy. Open Records Decision Nos. 600 (1992) (information regarding employee TexFlex benefits, dependent information, and designation of life insurance beneficiary is excepted by common law privacy), 545 (1992) (deferred compensation plan). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Open Records Decision No. 600 (1992). Exhibits E and F include information involving beneficiary designation forms and deferred compensation information designating primary and contingent beneficiaries. We believe this information is protected by a common law right of privacy. Therefore, we conclude the city must withhold Exhibits E and F, in their entirety, under section 552.101 of the Government Code.

Fifth, you assert Exhibit D is excepted from public disclosure because it contains W-4 forms. Section 552.101 excepts from disclosure information protected by other statutes. Form W-4, the Employee's Withholding Allowance Certificate, is confidential as tax return information

under title 26, section 6103(a) of the United States Code and must not be released. Open Records Decision No. 600 at 8-9 (1992). We note here that tax information was also found in other documents located within the sample employees' personnel files, mainly, the Payroll Change and Appointment Authorizations. We have marked those documents for your convenience.

Lastly, we note that one of the files you submitted to this office for review includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

In summary, the city must withhold personnel identification numbers under section 552.101 only when the employee is a member of the city's credit union; home telephone numbers, home addresses, social security numbers and whether an employee has family members must be withheld when the employee has timely fulfilled the requirements of section 552.024; social security numbers may be excepted under the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I); information that relates to a driver's license and motor vehicle title or registration must be withheld under section 552.130; information regarding an employee's dependent designations or designation of life insurance beneficiaries is excepted under section 552.101 in conjunction with common law privacy; Form I-9 must be withheld; and finally, W-4 forms are considered tax information and must be withheld.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

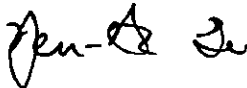
statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref: ID# 145746

Encl. Marked documents

cc: Mr. Frantisek Benes, P.E.
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(w/o enclosures)